CURRENT LEGISLATION

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TRADE UNIONS AND THE INJUNCTION IN TRADE DISPUTES.—The legislative sessions of 1919 indicate a revival of previous efforts to "legalize" trade unions and to limit injunctive relief in trade disputes. Four such laws were enacted last year[1] and two in 1917.[2] Although there had been some earlier legislation of this nature,[3] the present laws date from and are modelled on the labor clauses of the Clayton Anti-Trust Act of 1914.[4] The statutes generally declare that it shall be lawful for working people to organize unions to increase wages, reduce hours, and improve conditions, and "to carry out their legitimate objects by lawful means". Second, they forbid the issuance of injunctions in labor disputes except where necessary to prevent irreparable damage to property or property rights[5] and in the absence of adequate remedy at law. Third, injunctions may not forbid certain specified acts: ceasing work or inducing others to do so; peaceful picketing and persuasion; ceasing to patronize or inducing others not to patronize; payment of strike benefits; peaceable assembly; or "any act which might be lawfully done in the absence of such dispute by any party thereto". Fourth, these specified acts are pronounced lawful.

The Clayton Act, which is the prototype of these laws, was hailed by organized labor as a "Bill of Rights".[6] On the other hand, judicial comment on the labor clauses of the Act is all to the effect that it

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[1]Wash., Laws 1919, c. 185; N. D., Laws 1919, c. 171; Wis., Laws 1919, c. 211; Ore., Laws 1919, c. 346.

[2]Minn. Laws 1917, c. 493, Gen. Stat. Supp. 1917 § 3946; Utah, Laws 1917, c. 68. See also Iowa, Laws 1913, c. 171. The Utah statute, § 8, is the only one that embodies the provisions of the Clayton Act for trial by jury in contempt cases. (1914) 38 Stat. 738, § 22, U. S. Comp. Stat. 1916 § 1243d.

[3]Pa. Act of 1872, 4 Purd. Dig. (13th ed.) p. 4807; Cal. Laws 1903, p. 289, Penal Code (Deering) 1909, p. 762; N. J., Laws 1883, p. 36, 3 Comp. Stat. 1910, p. 3051. See also N. Y. Consol. Laws, c. 39, (Laws 1909, c. 88) § 43.

[4](1914) 38 Stat. 730, §§ 6, 20, U. S. Comp. Stat. 1916, §§ 8835f, 1243d.

[5]The Washington statute, *supra,* footnote 1, adds "or to a personal right". The Oregon statute requires that "the right to enter into the relation of employer and employee, or to change that relation, or to assume and create a new relation; or to work and labor as an employee, shall be held and construed to be a personal and not a property right". The Minnesota law has a similar provision. The clause originated in Mass., Laws 1914, c. 778, § 2. It was held unconstitutional in Bogni *v.* Perotti (1916) 224 Mass. 152, 112 N. E. 853.

[6]The American Federation of Labor characterized the clauses as a "splendid victory for organized labor" and quoted a letter from President Wilson to the effect that "justice has been done the laborer". Report of Exec. Council of A. F. of L. to 34th Annual Convention, Nov., 1914, on the Clayton Act.

legalizes no acts that were before unlawful.[7] Although the Supreme Court has not passed upon these sections of the law, its temper has been revealed in a *dictum* that the Clayton Act does not announce any new policy in labor cases.[8] The federal decisions are merely authority for the rule that acts of violence may still be enjoined in these cases; but their trend may well dampen labor's erstwhile enthusiasm over the humanitarian phraseology of the statute.[9]

Several decisions under the earlier state laws also strengthen the impression that laws of this tenor do not increase the privileges and immunities of labor. A Massachusetts statute,[10] a forerunner of the present series, was held unconstitutional (in a dispute between two labor unions) because it declared that the right to carry on business in the relation of employer and employee, and the right to do work and labor as an employee should be construed as personal and not as property rights.[11] The law was intended to prevent injunctions against unionists, and was invalidated because it prevented injunctions in their favor. Under a California Statute[12] forbidding the use of injunctions in labor disputes, the court nevertheless issued an injunction against a boycott and against peaceful picketing, and declared *obiter* that any other construction would render the act unconstitutional.[13] A New Jersey statute[14] "legalizing" labor combinations and peaceful persuasion has been held merely to exempt unionists from criminal liability for conspiracy.[15] A Pennsylvania statute[16] legalizing strikes has been similarly limited, thus permitting an injunction against an orderly strike for a closed shop, and "coercive" acts, even though unaccompanied by violence.[17]

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[7]See Kroger Grocery Co. *v.* Retail Clerks (D. C. 1918) 250 Fed. 890, 893. In United States *v.* Norris (D. C. 1918) 255 Fed. 423, 424, Sanborn, *J.*, stated: "I think that Section 20 was intended to legalize lawful strikes and peaceful, lawful persuasion." In Stephens *v.* Ohio State Tel. Co. (D. C. 1917) 240 Fed. 759, 771, the court said: "The statute but enacts the position which courts have universally taken; there is nothing new in it." See also United States *v.* King (D. C. 1916) 250 Fed. 908, 910.

[8]In Paine Lumber Co. *v.* Neal (1917) 244 U. S. 459, 471, 37 Sup. Ct. 718, 720, Holmes, *J.*, stated in his majority opinion that he was in the minority in thinking that the Clayton Act established any new policy in labor cases; and Pitney, *J.*, probably voiced the real opinion of the court on this point in his dissenting opinion, declaring (p. 485) that "only 'lawful' measures are sanctioned,—that is, of course, measures that were lawful before the act". The decision turned on a different point.

[9]Samuel Gompers said in an article appended to the report cited *supra*, footnote 6, that "this statement 'the labor of a human being is not a commodity or article of commerce' is epochal."

[10]Mass., Laws 1914, c. 778, § 2.

[11]Bogni *v.* Perotti, *supra*, footnote 5.

[12]*Supra*, footnote 3.

[13]Goldberg *v.* Stablemen's Union (1906) 149 Cal. 429, 86 Pac. 806.

[14]*Supra*, footnote 3.

[15]"It renders innocent, as against the public, an act which previous to its passage, was a misdemeanor and punishable by indictment." Frank *v.* Herold (1901) 63 N. J. Eq. 443, 52 Atl. 152; Jonas *v.* Glass Bottle Blowers (1908) 77 N. J. Eq. 219, 79 Atl. 262; see Connett *v.* Hatters (1909) 76 N. J. Eq. 202, 211, 74 Atl. 188.

[16]*Supra*, footnote 3.

[17]The dispute was here, as in the Massachusetts case, *supra*, footnote 5, between rival unions. Erdman *v.* Mitchell (1903) 207 Pa. 79, 56 Atl. 327.

The decisions so far indicate only one definite change in the law. A divided Circuit Court of Appeals has held that the Clayton Act legalizes a secondary boycott.[18] Of course, much of the language "legalizing" unions is unnecessary. Trade union funds, except for a dubious "statutory implication" under the Sherman Law,[19] have enjoyed an immunity in this country which was achieved only by political action and legislation in England.[20] The criminal law of conspiracy has not been consciously applied to labor organizations in this country for nearly a century.[21]

It is apparent that the support which labor has given to the injunction provisions of these acts is based upon a misapprehension of the effect of the language. To limit the injunctions to cases of irreparable injury to property in the absence of adequate remedy at law is simply to enact one of the classical rules of equity jurisdiction.[22] Apparently Mr. Gompers thought that property meant tangible property.[23] The Massachusetts decision must have disabused him of that view.[24] He also seems to have had an idea that equity always considered criminal prosecution such an "adequate remedy at law" as to bar injunctive relief.[25] The decided cases are clear authority to the contrary.[26]

Furthermore, the provisions of these Acts regarding strikes and picketing are not sufficiently explicit to effect any clarification in the law. Picketing, for instance, has been held unlawful, if intimidating;[27]

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[18]Duplex Press Co. *v.* Deering (C. C. A. 1918) 252 Fed. 722. If this is the correct interpretation of the Clayton Act, its effect will be to override the decision of Loewe *v.* Lawler (1907) 208 U. S. 274, 28 Sup. Ct. 301.

[19]Dowd *v.* United Mine Workers (C. C. A. 1916) 235 Fed. 1.

[20]Trades Disputes Act, 6 Edw. VII (1906) c. 47, § 4. This Act was passed to overcome the effect of the decision of the House of Lords in Taff Vale Ry. *v.* Railway Servants [1901] A. C. 426; it forbids actions against trade unions for torts arising out of trade disputes. Although trade unions do not enjoy any such express immunity in this country, it is almost impossible to reach union funds.

[21]People *v.* Fisher (N. Y. 1835) 14 Wend. 9 is a case applying the doctrine. *Contra,* Stevedores *v.* Walsh (N. Y. 1867) 2 Daly 1, and Commonwealth *v.* Hunt (1842) 45 Mass. 111.

[22]Story, Eq. Jur. (14th ed.) §§ 94, 1184; High, Injunctions (4th ed.) § 1415b.

[23]"Both the injunction and the trust law are intended to apply to property; extension of their application to human labor and normal human activity for human betterment reduces the workers to the same legal status as things." Article cited *supra,* footnote 6, p. 9.

[24]Bogni *v.* Perotti, *supra,* footnote 5.

[25]"In all things in which workmen are enjoined by the process of an injunction during labor disputes, if those acts are criminal or unlawful, there is now ample law and remedy covering them. From the logic of this there is no escape." Samuel Gompers in editorial in American Federationist, August, 1908. These editorials and the report cited above are still advanced as representing the attitude of the Federation.

[26]*In re* Debs (1894) 158 U. S. 564, 593; Vegelahn *v.* Guntner (1896) 167 Mass. 92, 99, 44 N. E. 1077; Pierce *v.* Stablemen's Union (1909) 156 Cal. 70, 103 Pac. 324.

[27]Vegelahn *v.* Guntner, *supra,* footnote 26, at p. 103.

lawful if reasonable;[28] unlawful, whether peaceful or not,[29] if intimidating; unlawful under any conditions.[30] "The challenge is to the court to define peaceful picketing within the limits of this section."[31] What will be the effect of the statute in a jurisdiction which holds that there is no such thing as peaceful picketing?[32] "Peacefully persuading any person to work or to abstain from working" may be pronounced legal, but it leaves the important issues to judicial determination.

Similarly the law of strikes is not clarified by a simple declaration that it is lawful to cease work or to induce others to do so. There is already a recognized right to strike, but it may only be exercised in furtherance of a lawful object or purpose.[33] If the exercise of a right inflicts temporal damage, there must be a justification in the purpose of the act.[34] Thus the courts are left to decide what is a lawful purpose, and they have great difficulty in reaching agreement.[35] Here again the substantive law leaves room for the play of judicial bias, which is so clearly exhibited in the decisions of the courts.

It is submitted that labor's protest against the injunction arises, in the final analysis, from the unfavorable state of the substantive law. In point of fact, labor has approved the use of the injunction in the protection of property,[36] but resents its application to labor activity. And although the use of injunctions and the consequent punishment for contempt lend to these civil controversies an obnoxious criminal character, the fundamental remedy lies in a revision of the law upon which injunctions are granted and not in the abolition of the use of the injunction in trade disputes. The present statutes are entirely inadequate; the need is for some explicit legislation defining the lawful means and lawful objects of labor activity.

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[28]See White Mountain Co. *v.* Murphy (1917) 78 N. H. 398, 405, 101 Atl. 357.

[29]See St. Germain *v.* Bakery Workers' Union (1917) 97 Wash. 282, 289, 166 Pac. 665.

[30]Pierce *v.* Stablemen's Union, *supra,* footnote 26, at p. 79.

[31]Killits, *J.,* in Stephens *v.* Ohio State Tel. Co., *supra,* footnote 7, at p. 771.

[32]Atchison, *etc.* R. R. *v.* Gee (1905) 139 Fed. 582, 584.

[33]De Minico *v.* Craig (1911) 207 Mass. 593, 94 N. E. 317; see Hitchman Coal & Coke Co. *v.* Mitchell (1917) 245 U. S. 222, 257, 38 Sup. Ct. 65.

[34]This is the statement of Bowen, *L. J.,* so often quoted from Mogul S. S. Co. *v.* McGregor (1889) 23 Q. B. Div. 598. See Aikens *v.* Wisconsin (1904) 195 U. S. 194, 204, 25 Sup. Ct. 3.

[35]Strikes for a closed shop held lawful: National Protective Ass'n. *v.* Camming (1902) 170 N. Y. 315, 63 N. E. 369; see Jacobs *v.* Cohen (1905) 183 N. Y. 207, 76 N. E. 5; unlawful: Folsom *v.* Lewis (1911) 208 Mass. 336, 94 N. E. 316; *cf.* Connors *v.* Connolly (1913) 86 Conn. 641, 86 Atl. 600. Strikes against non-union material lawful in New York, Bossert *v.* Dhuy (1917) 221 N. Y. 342, 117 N. E. 582; but unlawful in New Jersey, Booth *v.* Burgess (1906) 72 N. J. Eq. 181, 65 Atl. 226. It was held unlawful to unionize a mine with a view to striking for a closed shop in Hitchman Coal & Coke Co. *v.* Mitchell, *supra,* footnote 33.

[36]"In itself the writ of injunction is of a highly important and beneficent character. Its aims and purposes are for the protection of property rights." Editorial by Mr. Gompers cited *supra,* footnote 25.